IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 756 of 1997

with

SPECIAL CIVIL APPLICATION No 3081 of 1997

For Approval and Signature:

Hon'ble THE ACTING CJ R.A.MEHTA and
MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes @e eferred to the Reporter or not? Yes @e referred to the Repor er or not? Yes @e referred to the Reporter or not? Yes @e referred to the Reporter or not? Yes @e refer ed to the Reporter or not? Yes @e referred to the Reporter o not? Yes @e referred to the Reporter or not? Yes @e referred to the Reporter or not? Yes @e referred t the Reporter or not? Yes @e referred to the Reporter or not Yes @e referred to the Reporter or not? Yes @e referred to the Reporter or not? Yes @e referred to the Reporter or not? Ye @e referred to the Reporter or not? Yes ee referred to the Reporter or not? Yes @e referred to the Repo ter or not? Ye

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

ADDITION ADVERTISING
Versus
UNION OF INDIA

Appearance:
1. Special Civil Application No. 756 of 1997
MR PR NANAVATI for Petitioner
MS AVANI S MEHTA for Respondent No. 1
SERVED BY DS for Respondent No. 2

2. Special Civil ApplicationNo 3081 of 1997
MR PR NANAVATI for Petitioner
MR HAROOBHAI MEHTA for Respondent No. 1
MS AVANI S MEHTA for Respondent No. 2

CORAM : THE ACTING CJ R.A.MEHTA and
MR.JUSTICE N.N.MATHUR
Date of decision: 22/07/97

ORAL JUDGEMENT
(Per R.A.Mehta,ACJ)

1. The petitioner, an advertising agency challenges the vires of the provisions of sections 65 (16)(d) and

66(2) of the Chapter V of Finance Act, 1994 as amended. By these provisions, a service tax is imposed on advertising service. The challenge is based upon Articles 14, 19(1)(a) and 265 of the Constitution of India.

2. Section 65(16)(d) defines "taxable service" to mean... any service provided to a client by an advertising agency in relation to advertisements in any manner. Section 66 is the charging section which provides that there shall be charged a service tax at the rate of 5% of the value of the taxable service. Section 67 provides for valuation of taxable service for charging the service tax and clause (d) provides that in relation to service provided by an advertising agency to a client, the gross amount charged by such agency from the client shall be for services in relation to the advertising.

3. It is submitted that advertising service is a skill of expression and there is a fundamental right to freedom of speech of expression guaranteed by Article 19(1) of the Constitution and, therefore,the tax on this freedom of speech and expression is violative of Article 19(1) of the Constitution of India.

4. Reliance is placed on the judgment of the Supreme Court in the case of Express Newspaper and ors. Vs. Union of India, AIR 1958 SC 578. In para 142, the

Supreme Court has summarised the principles relating to the freedom of speech and expression and observed in para 143 that no measure can be enacted which would have the effect of imposing a pre-censorship, curtailing the circulation or restricting the choice of employment or unemployment in the editorial force and such a measure would certainly tend to infringe the freedom of speech and expression and would therefore be liable to be struck down as unconstitutional. However, in para 144, the Supreme Court has clearly held that the press is not immune from the ordinary forms of taxation for support of the Government nor from the application of general laws relating to industrial relations. Therefore,merely because there is a tax on press or any activity of speech or expression, it does not necessarily become violative of freedom of expression.

Similarly, in the case of Indian Express Newspapers and ors. Vs. Union of India, AIR 1986 SC 515, it has been held that the newspaper industry has not been granted exemption from taxation in express terms, and negativing the argument based on Article 19(a) of the Constitution, the Supreme Court held that merely because the Government has power to levy taxes, the freedom of press would not be totally lost. The Supreme Court observed that while there can be no tax on the freedom of expression, tax can be levied on profession, occupation, trade, industry or business and hence the tax was leviable on newspaper industries also. It is only when tax measure stifles the freedom of expression, it invites interference of the Court. It is, thus, clear and well settled that a tax on activity which may be of expression, is not immune from tax.

5. In the present case, the rate of tax is 5% of the gross amount charged by the advertising agency from the client for services in relation to advertising. This cannot be said to be in any manner unreasonable. In fact, it is on the lower side, and such could hardly be a subject matter for the Court to decide unless it assumes exproprietory proportion. The rate of tax depends on many socio-economic parameters and value judgments of which the Legislature is the best judge. The Court has very little scope to interfere on the rate of tax. Therefore, there is no merit in the contention of violation of Article 19(1) of the Constitution.

6. There is no merit in the contention that there is a vague and arbitrary classification of commercial and non commercial advertising and, therefore, it is violative of Article 14 of the Constitution. Commercial

and non-commercial are wellknown concepts and have been judicially interpreted and recognised under many legislations and cannot be said to be either vague or arbitrary. It is a rational classification. If the Legislature does not want to tax or wants to tax less the non-commercial advertisements, it cannot be said to be in any manner irrational.

7. In Indian Express case (supra), the Supreme Court has upheld the classification of small, medium and big newspapers for levy of customs duty on newspapers as it was held to be rational.

8. Lastly, it is contended that there is lack of legislative competence in the Parliament for imposing service tax on advertising agencies and it is contended that it is a tax in the nature of sales tax or it is a tax on the calling of advertising agency. Entry 54 of State List is taxes on the sale or purchase of goods other than newspapers subject to provision of Entry 92-A of List I. Entry 92-A is Inter-State sales tax. The present tax on advertising services cannot be by any stretch of imagination be brought into Entry "Sale or Purchase of goods".

It is also contended that this tax is a tax on advertising service- a profession or calling and would fall under State List Entry 60 i.e. taxes on professions, trades, callings and employments.

This is not a tax on any profession, trade, calling or employment, but is in respect of the service rendered. If there is no service, there is no tax.

9. In the case of Western India Theatres Ltd.Vs. Cantonment Board, Poona, AIR 1959 SC 582, it was held that the entertainment tax is not imposed for the privilege of carrying on any trade or calling, but it is a tax imposed on every show, that is to say, on every instance of the exercise of the particular trade, calling or employment and if there is no show there is no tax. A lawyer has to pay a tax or fee to take out a licence irrespective of whether or not he actually practises.That tax is a tax for having the privilege of practising if and when a person taking out a licence chooses to do so. In the present case, what is taxed is not the calling but the service rendered. If there is service, there is tax. Therefore, it is not a tax on the calling and, therefore, it is not covered by Entry 60 of the State List.

10. In the affidavit-in-reply,the distinction between

the subject of tax and measure of tax is pointed out. The subject of tax is not calling of advertising service, but actual rendering of service and the measure of tax as well as charging provision of tax is based on the gross amount paid for service.

11. It is also contended in the petition that the State Entry 55 "tax on advertisement" would also exclude the Parliamentary competence. Here also, the petitioner is not right because the tax is not on advertisement, but is on the services rendered with reference to the advertisement and there is a clear distinction between the advertisement and the advertising services. As a result of the advertising services rendered, it results in an advertisement which can be published and republished and copied.

In view of the aforesaid discussion, we do not find any merit in any of the contentions. Hence the petition is dismissed. Notice discharged.
